BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a AmerenUE for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Company's Missouri Service Area.	))))))	**ER-2007-0002**

APPLICATION FOR REHEARING OR RECONSIDERATION OF ORDER OF SEPTEMBER 12, 2006 BY NORANDA ALUMINUM, INC.

COMES NOW NORANDA ALUMINUM, INC. ("Noranda") and through its attorney seeks rehearing or reconsideration of the Commission's Order Adopting Procedural Schedule and Test Year dated September 12, 2006 ("Order") in the particulars described in the following discussion:

A. Timeliness of This Application.

The subject Order was issued on September 12, 2006 and stated to be effective on September 22, 2006. This Application is filed within 10 days of the September 12, 2006 date and in advance of the effective date of the Order. It is, accordingly, timely.

B. The Commission's Advance Limitation on the Length of Post-Hearing Briefs is Arbitrary, Capricious, Unreasonable, and Violates Governing Missouri Law and Public Policy.

In Paragraph D of its September 12 Order (p. 4), the Commission rules in advance on page lengths for post-hearing briefs. Paragraph D states:

> Posthearing briefs will be limited to fifty (50) pages.

It is arbitrary to seek to limit the length of any post-hearing brief months before the record is complete and, indeed, months before the hearing has even been held and any intelligent guess can be made regarding the length of the hearing, or the issues that will be tried and the issues that may be resolved without trial. Moreover, there is no competent and substantial evidence to support such a decision. Such decisions are best left to the end of the hearing. At that time the number and complexity of the issues that the Commission must resolve will be known. The extent of the record necessary to be analyzed as well as the exhibits to be addressed will also be known. In apparent recognition of the potential contentiousness of this proceeding, in this same Order and in an earlier determination, the Commission added a third week of hearing to the procedural schedule.

Though no longer explicit, there still appears the perception that prehearing briefs are an alternative to a post-hearing brief or can somehow be sufficient to comply with statutory requirements or provide the parties with the rights they are due under the law. Indeed, the length of the hearing and many of the issues that may be raised or developed in that hearing is less controlled by the parties and what they file as by the

questions that are posed by various commissioners, the need for additional questions and activity following those questions, the additional rounds of cross-examination that may be necessitated by those questions, and the need to consider exhibits that may be produced or requested during those exchanges. More recently, in Case No. ER-2006-0315, the Commission posed "Questions" to the parties concerning issues that, at least by one party, already had been addressed in earlier pleadings and would again be addressed, presumably by all the parties in post-hearing briefs.

There continues to be apparent confusion between the purpose of a pre-hearing brief and the purpose of a post-hearing brief. Although the parties did not recommend scheduling of a pre-hearing brief, and instead recommended that position statements be submitted, the Commission apparently desired a prehearing brief, but used descriptive terms that identified the desired filing as nothing more than a statement of position. Doubtless, a prehearing brief can be a useful addition to the procedure.[1/] Appropriately used, a prehearing brief can succinctly state the issues and articulate the party's position on those issues, very much like the "statements of position" that the parties had proposed to file in this case. A prehearing

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[1/] Actually, this practice is neither new nor inventive. For a number of years the practice of a "hearing memorandum" was followed. However, that document grew so lengthy and its preparation became so cumbersome that it was abandoned in favor of "statements of position" which include all the material necessary to orient the Commissioners to the issues in the case and do not require concurrence by the other parties in the wording of a party's position.

brief can also identify specific legal issues that may arise in the case and provide the submitting parties an opportunity to make initial arguments regarding those issues.

But a prehearing brief is not a substitute for an effective and well-drafted post-hearing brief for several reasons. *First*, no litigator worth the title of attorney should be expected to reveal -- in advance of hearing -- their trial strategy, including the witnesses that they expect to cross-examine, the content of that cross-examination and the forensic exhibits that they may choose to introduce to limit the witness' testimony or otherwise impeach their credibility or to build the record in the case from the perspective and position of their respective clients. American jurisprudence is an adversary process which intentionally presents the decisionmaker with conflicting views of often sharply disputed facts and opinions. Sifting through these conflicting viewpoints, i.e., being a decisionmaker, is hard work.

The hearing process is, among other things, an opportunity for the foundations of an opposing witnesses' opinions to be undercut or the witness impeached. Expecting parties to reveal through a pre-hearing brief their trial strategy compromises their most basic responsibilities, could require the disclosure of attorney work-product, and may be subject to challenge as an attempt by the Commission to regulate how law is practiced which is clearly beyond the Commission's jurisdiction.

Second, there is legitimate concern that the Commission's apparent desire to impose page limits on post-hearing briefs months in advance of the hearing runs afoul of the Commission's basic responsibility to base its decision on competent and substantial evidence on the whole record.[2] *A priori*, a prehearing brief cannot be based on the ***record*** of the proceeding, since that record ***does not exist*** until the time of the hearing and is only developed through that hearing process. Indeed, prepared testimony -- the only thing on which a prehearing brief could be based -- is ***not part of the record*** -- and cannot be "competent" evidence within the meaning of the Missouri Constitution -- until it has been subjected to cross-examination.[3] "Competent evidence is defined by Missouri courts as relevant and ***admissible*** evidence that can establish the fact at issue."[4] Surely the Commission does not wish to sug-

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[2] An administrative decision in a contested case must be supported by competent and substantial evidence on the whole record. Mo. Const., Art. V, Section 18.

[3] Fixing of rates imposes a

> "duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such."

Morgan v. United States, 298 U.S. 468, 479-80, 56 S.Ct. 906, 80 L.Ed. 1288 (1936).

[4] *City of Kan. City v. New York - Kan. Bldg. Assocs.*, L.P., 96 S.W.3d 846, 861 (Mo. Ct. App. 2002); *Loven v. Greene County*, 63 S.W.3d 278, 292 (Mo. Ct. App. 2001); *Consolidated Sch. Dist. No. 2 v. King*, 786 S.W.2d 217, 219 (Mo.App. W.D. 1990) (emphasis added).

(continued...)

gest that the hearings it holds are of so little importance or significance or that what happens at that hearing, including the valued right of cross-examination, is so unimportant that the length of a post-hearing brief required to address those issues accurately can be predicted months in advance.

Third, Section 536.080 RSMo 2000 imposes the requirement upon the Commission and requires that the individual commissioners certify compliance with its alternative provisions. The Section provides:

> 1. In contested cases each party shall be entitled to present oral arguments or written briefs ***at or after*** the hearing which shall be heard or read by each official of the agency who renders or joins in rendering the final decision.
>
> 2. In contested cases, each official of an agency who renders or joins in rendering a final decision shall, prior to such final decision, either ***hear all the evidence, read the full record including all the evidence, or personally consider the portions of the record cited or referred to in the arguments or briefs. . . .***[5/]

[4/](...continued)

Evidence is not competent if there is no opportunity for cross-examination.

> "These reasons were not competent as evidence prior to the cross-examination of the witness, nor were they made either necessary or competent by that cross-examination.

State v. McDonough, 232 Mo. 219, 234 (Mo. 1911)

[5/] Section 536.080 RSMo 2000 (emphasis added).

A prehearing brief cannot be prepared "at or after" the hearing and therefore cannot be used as a substitute for briefing that follows the hearing. In *T. J. Moss Tie*, the court, stated:

> Under the provisions of section 536.080, each agency official who joined" in rendering a final decision" was required prior thereto either to have heard all the evidence, to have read the full record including all the evidence, or personally to have considered the portions of the record cited or referred to in arguments or briefs. Inasmuch as only one commissioner heard the evidence ***and no transcript was available until eleven days after the decision and thus another commissioner could not have read the full record or considered citations to such transcript prior to the decision, and inasmuch as the record does not disclose any written or oral stipulation of the parties waiving compliance with the provisions of section 536.080, it is apparent that the requirements of that section were ignored.***[6/]

Section 536.080.2 RSMo 2000 provides three explicit alternatives for decisionmakers: (1) ***hear all*** the evidence; (2) ***read*** the ***full record including all the evidence***; or (3) personally hear or read and consider the portions of the ***record cited in the arguments or briefs***.[7/]

Setting aside the issue of a dishonest certification, a commissioner cannot read a prehearing brief and fulfill this statutory requirement. The "record" does not yet exist and

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[6/] *T. J. Moss Tie Co. v. State Tax Com.*, 345 S.W.2d 191, 193 (Mo. 1961).

[7/] It should immediately be observed that the statute provides ***only*** these three alternatives. It does ***not*** on its face permit a commissioner to hear "some" of the evidence, read the "balance" of the record, and then rely upon the parties briefs to bridge that which the commissioner did not "hear." The statute does ***not*** say ". . . or any combination of the foregoing."

cannot be cited in a prehearing brief. Although in appropriate cases a reviewing court may be willing to presume compliance with the statutory requirement,[8] that presumption is rebuttable and could be easily rebutted by a showing that compliance was impossible.[9]

These three alternatives provided by the General Assembly recognize the power post-hearing briefing brings to the

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[8] *State ex rel. Jackson County v. Public Service Com.*, 532 S.W.2d 20, 30 (Mo., 1975):

> . . . . it is presumed that administrative decisions are made in compliance with applicable statutes. *Dittmeier v. Missouri Real Estate Commission*, 316 S.W.2d 1 (Mo. *en banc* 1958), *cert. denied* 358 U.S. 941, 3 L. Ed. 2d 348, 79 S. Ct. 347.

[9] Consider the court's words from *State ex rel. Jackson County v. Public Service Com.*, 532 S.W.2d 20 (Mo. 1975):

> However, the facts as to Commissioner Sprague create a possible denial of due process and the actual truth of the matter should be brought forward. To accomplish the same, and hopefully to avoid further delay in this matter, the trial court is directed to modify its "order of remand" to allow Commissioner Sprague ten days to certify to it that he had complied with § 536.080 at the time of denial of the motions for rehearing. Absent such certification, the remand for reconsideration should follow.

To this point, the Missouri courts have also ruled:

> Our Administrative Procedure Act provides that upon judicial review of a decision or order of an administrative officer or body: "The court may in any case hear and consider evidence of alleged irregularities in procedure or of unfairness by the agency, not shown in the record." § 536.140, P4.

Dittmeier v. Missouri Real Estate Com., 316 S.W.2d 1, 5 (Mo. 1958).

decisional process. This is the opportunity that the attorneys can "connect the dots" in their respective cases after the evidence and exhibits (the "dots") are "in the can" and after the witnesses have been subjected to the crucible of cross-examination. Not only does the Commission risk violation of the statute by a procedure that arbitrarily cripples post-hearing briefs, it deprives itself of the benefit of the analysis of the parties who should best know their respective cases to marshall their arguments, testimony, evidence and exhibits to the proof of their respective cases. Competent practitioners should reject an attempt to "dumb down" the process and to make their skills in trial advocacy and persuasive writing superfluous or irrelevant.

If it is to be the position of the Commission that the hearing does not matter and that what happens at the hearing does not matter, then the Commission should openly state so rather than implicitly try to limit the significance of the hearing, and the cross-examination of witnesses, by decreeing the length of the post-hearing brief months in advance.

The Commissions' arbitrary and capricious advance determination of the length and content of post-hearing briefs raises other questions that go to the heart of the essential fairness of the hearing. What if the cross-examination by the parties and the Commissioners' questions and their responses require more than 50 pages to address? How can that be addressed if the Commission has predetermined the length of that pleading? What if prefiled testimony is the subject of an objection and the

objection is sustained? Or is such testimony's simple filing now thought sufficient to include it in the record? Is the Commission seeking recognition of a new definition of what constitutes "the record?" And what in such a case should be made of a particular party's reliance on the rejected testimony in their prehearing brief. How can such a rejection be "updated?"

These and possibly many other questions many of which may rise to the level of due process issues can be avoided by simply withdrawing Paragraph D or substituting language that clarifies that a decision regarding the length of post-hearing briefs will be made after the hearing is concluded and the parties have discussed their needs.

C. The Order Should Be Clarified or Rehearing Granted to Include the Provisions the Parties Requested Be Made Part of the Scheduling Order.

In their submission of August 29, 2006, the parties included several specific items in Paragraph 3 of that submission as follows:

> 3. All parties also have agreed to the following procedures ***and request that these agreed to matters be reflected in the Commission's Order setting the procedural schedule:***
>
> (a) AmerenUE used a test year ending June 30, 2006, with nine months actual data and three months forecasted data as well as pro forma adjustments to include certain items through January 1, 2007. AmerenUE will update its case on September 29, 2006 to substitute actual data for the three months of forecasted data it filed in its July 7, 2006 direct testimony and to provide testimony and data

on the July 2006 storms. AmerenUE will true-up its test year through January 1, 2007.

(b) Administrative consolidation of the electric and gas rate cases is requested by the parties where practical. For example, the parties are requesting that the Commission acknowledge in an Order that discovery in either the electric or the gas rate case can be used (subject to applicable evidentiary rules) in the other case and make any necessary revisions to the Protective Orders that have been issued by the Commission (paragraphs I and U of the Protective Orders). Also, the evidentiary record for certain issues, for example pensions and OPEBs, likely would be the same for both the electric and the gas rate cases. Nonetheless, the evidentiary record for certain other issues, for example the specific analysis relating to rate of return (the determination of the risk of a gas utility versus the determination of the risk an electric utility) would not be the same.

(c) All parties agree that they will provide copies of testimony (including schedules), exhibits and pleadings to other counsel by electronic means and in electronic form essentially concurrently with the filing of such testimony, exhibits or pleadings where the information is available in electronic format. Parties are not required to put information that does not exist in electronic format into electronic format for purposes of exchanging it.

(d) An effort should be made to not include in data request questions either highly confidential or proprietary information. If either highly confidential or proprietary information must be included in data request questions, the highly confidential or proprietary information should be appropriately designated as such pursuant to the Protective Order issued in the case.

(e) Counsel for each party is to receive electronically from each other party, a copy of all data requests served by that party on another party in the case - if a party desires the response to a data request that has

been served on another party, the party desiring a copy of the response must request a copy of the response from the party answering the data request - in this manner the party providing a response to a data request has the opportunity to object to providing the response to another party and is responsible for copying information purported to be highly confidential or proprietary - thus, if a party wants a copy of a data request response by AmerenUE to a Staff data request, the party should ask AmerenUE, not the Staff, for a copy of the data request response unless there are appropriate reasons to direct the discovery to the party originally requesting the material.

(f) Until the January 31 filing of rebuttal testimony on revenue requirement and other on-customer class cost of service and non-rate design pertinent issues, the response time for all data requests is 20 calendar days, and 10 calendar days to object or notify that more than 20 calendar days will be needed to provide the requested information. After January 31, the response time for data requests becomes 10 calendar days to provide the requested information, and 5 business days to object or notify that more than 10 calendar days will be needed to provide the requested information.

(g) Workpapers that were prepared in the course of developing a witness' testimony should not be filed with the Commission but should be submitted to each party within 2 business days following the filing of the particular testimony. Workpapers containing highly confidential or proprietary information should be appropriately marked. Since workpapers for certain parties may be voluminous and generally not all parties are interested in receiving workpapers or a complete set of workpapers, a party shall be relieved of providing workpapers to those parties indicating that they are not interested in receiving workpapers or a complete set of workpapers.

(h) The parties are hereby requesting that the Commission provide for expedited tran-

scripts of the evidentiary hearings. (Emphasis added).

The Order addressed some, but not all, of these matters. Specifically, the Order appears to have addressed items (a), (b), and (h). Item (f) was addressed but only indirectly through the procedural schedule without a specific reference in the Order. The other items, (c), (d), (e), and (g) were not addressed at all.

These matters should be addressed as they are part of the parties agreement to the provisions and, in several instances, the "tight" times in the schedule that was recommended. These are items to improve the efficiency of the processing of the rate case. Pleadings should be circulated to counsel electronically. Data requests (not responses) should be provided to counsel without further request. To avoid unnecessary complications, reference to highly confidential information in data requests should be minimized. Workpapers should be provided without the need for additional requests. Although the parties at the prehearing may have agreed to these provisions and may be in compliance, they should be included in the order to avoid ambiguity and future issues.

D. The Proliferation of 5:00 p.m. Deadlines in the Order Should Be Modified and Time-Based Deadlines Imposed Only Where There Is a Rational Basis For Such Time-Based Deadlines.

The parties did not recommend filing times for most of the pleadings and testimonial filings provided in the procedural schedule recommendation. The Commission's Order imposes, in many

instances, a 5:00 p.m. time limit, even on testimony filings that should not matter to the Commission since they will not be in evidence until the hearing, if ever. Such arbitrary deadlines should be removed from the Order. In the case of testimony, what is important is that electronic copies be provided to other counsel essentially contemporaneously with filing of the testimony or prepared exhibits. There is no reason that these materials need to be filed by 3:00 p.m., 5:00 p.m or at 9:37 p.m. on the appointed day. It simply makes no difference to the Commission's operations. Since the Commission's EFIS works "24/7", there should be no personnel impact in any event. There should be rational reasons behind rules.

E. The Parties' Recommended Date for Submission of a Statement of Issues Should Be Reinstated; Alternatively the Commission Should Clarify Whether It Intends to Establish a Filing Deadline on a Saturday.

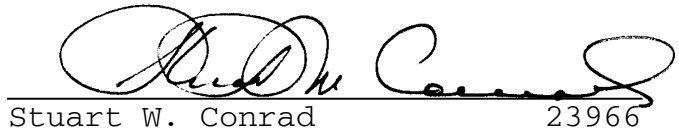
In their August 29 recommended procedural schedule, the parties suggested a date of January 26, 2007, a Friday, for submission of a statement of issues. In its Order, the Commission changed that date to January 27, 2007, which is a Saturday. Clarification is requested whether the Commission intended to require a filing of this pleading on a Saturday, which would, pursuant to other rules, push the filing over until the following Monday, January 29. The date the parties recommended would allow the weekend for the final preparation of rebuttal testimony; the Commission's date, extended under the rules to the following Monday, allows only three days before rebuttal would be due.

This is, of course, an example of why the parties recommendations regarding electronic service of pleadings, which the Commission failed to include in its Order, are important in the assembly of a procedural schedule.

WHEREFORE, rehearing or reconsideration of the September 12, 2006 Order should be granted and the Order corrected, modified, or clarified as set out above.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.



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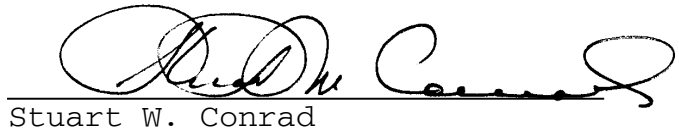
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by electronic means or by U.S. mail, postage prepaid, addressed to all parties by their attorneys of record as disclosed by the pleadings and orders herein.



Stuart W. Conrad

Dated: September 20, 2006